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# AUSTRALIA'S EXPERIENCE WITH REGULATORY REFORM: LESSONS FOR INDONESIA

**Prepared for the PEG-USAID conference on 'Decentralization, Regulatory Reform and the Business Climate', Hotel Aryaduta, Jakarta August 12, 2003**

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[1] PEG is a United States Agency for International Development (USAID)-funded Project with the Government of Indonesia. The views expressed in this report are those of the author and not necessarily those of USAID, the U.S. Government or the Government of Indonesia.

# AUSTRALIA'S EXPERIENCE WITH REGULATORY REFORM: LESSONS FOR INDONESIA

## Introduction

In 1960, Australia was ranked the *third* richest OECD nation. In 1992 it was ranked as the *fifteenth* richest. This slippage in ranking was largely due to the protection from competition of large sectors of the economy. Protected industries had little incentive to reduce costs and prices, produce new, innovative products and use resources as efficiently as possible.

Micro-economic reform including regulation review grew out of the recognition that the nation needed to improve the level of efficiency of its business and government enterprises and hence improve the nation's international competitiveness.

Australia is a federation. It has Federal Government together with six state and two territory governments. Each government has a right to pass laws and as a consequence, to impose a national reform package there was a need for agreement by all governments. The nine governments have a number of regulation-making institutions within their jurisdictions including statutory bodies and local governments. It is particularly in this area that Australian experience may be relevant as there are parallels with Indonesian organizational structures.

Current regulation review in Australia involves the examination of; existing regulations (the 'stock') at the time of the introduction of the scheme; and, of new regulations or amendments to regulations (the 'flow') that affect business or restrict competition. The examination of regulations is the responsibility of the proposing entity and is subject to review by a lead agency.

Current regulation review in Indonesia involves the examination of new or amendments to regulations (the 'flow') that that will generate economic or social costs for elements of the community. The examination of regulations is the responsibility of the Government of Indonesia.

This paper briefly discusses the history, best practice, outcomes and lessons learnt from the Australian experience with regulation review and provides some suggestions for a possible model for Indonesia.

## Regulation Review in Australia

For more than 17 years the Australian Federal Government has implemented a regulation review policy and has encouraged other Australian governments to follow its lead.

At a public address in 1984, the then Prime Minister of Australia, Bob Hawke, said:

I am convinced that after eighty-four years of federation, we have accumulated an excessive and often irrelevant and obstructive body of laws and regulations. We will examine critically the whole range of business regulation, most importantly with a view to assessing its contribution to long-term growth performance. We will maintain regulation, which upon careful analysis, clearly promotes economic efficiency, or which is clearly an effective means of achieving more equitable income distribution. And we will abandon regulation, which fails these tests.[2]

Within a few years of that announcement the Australian Federal Government and all other governments had set up regulation review units.

[2] Address to the Business Council of Australia, September 1984.

### *National Competition Policy*

In 1995 there was formally recognised consensus by all nine Australian governments that competition policy can work to promote competition that will contribute to increased efficiency, increased employment opportunities and higher standards of living. The governments sought to reduce regulatory impediments to the efficient operations of business and committed to a National Competition Policy reform package.
The policy contained a variety of measures to extend competition to previously sheltered parts of the economy. The National Competition Policy operates in two broad fronts;

- the review of laws that restrict competition; and
- a national access regime and price controls over 'essential facilities'.

Under the National Competition Policy Agreements, the Australian Government agreed to make special payments to States and Territories that made sufficient progress in implementing the National Competition Policy Reforms.

### *Jurisdictional review of regulations*

The jurisdictional review involves the application of a net public benefits test to legislation that restricts competition. All Australian governments agreed to review existing legislation to ensure consistency with the reform package and to allow anti-competitive conduct only if it is satisfied that the conduct resulted in a benefit to the community and that that benefit could not be achieved by some less restrictive means.
Each government prepared a timetable for its reviews of restrictive regulation and provided this to an independent body the National Competition Council (NCC) set up to advise on competition policy and to oversee National Competition Policy.
The NCC distributed guidelines for regulation review. The NCC has a continuing role in regard to new and amended regulations in that it liaises with the regulation review units of all governments and monitors the performance of all governments in pursuance of its National Competition Policy audit function in order to assess eligibility of governments for incentive payments.

### *Institutional development*

All nine Australian governments have their own regulation review units that coordinate, monitor and assess regulation review efforts within their own jurisdictions. The units also provide technical assistance to departments and agencies conducting reviews. Each jurisdiction has its own mechanisms for regulation review. As mentioned above, the NCC has a national role in support of competition policy reforms.
In all jurisdictions, regulation review in Australia has proceeded always with consciousness of the efficiency/competitiveness nexus.

### *Outcomes*

Almost 1700 regulations were initially identified as containing restrictions on competition. By the end of 2002 they were most had been reviewed and it was expected that any outstanding will be reviewed by the end of 2003.
Significant benefits have been achieved. These benefits include lowering 'red tape' hurdles faced by business. For example, the state of New South Wales has identified 85 licenses for repeal under a License Reduction Program, while South Australia has streamlined regulations affecting the keeping of livestock by repealing six separate acts and replacing them with one.

In the states of Queensland and Victoria, advertising and commercial controls in regulations governing health and medical practitioners have been reduced, allowing greater flexibility for business. These reforms allow for more competitive supply arrangements, with benefits to consumers in terms of lower prices and/or better service arrangements.

## Review of Australian Federal Government Regulation

The Australian Federal Government's regulation review program is an example of a well-developed mechanism. As with all Australian regulation review procedures, the onus is on all entities within the relevant jurisdiction to prepare Regulation Impact Statements (RISs) for all new or amended regulations that affect business or restrict competition. This is done under the guidance of a lead agency or 'gate-keeper' that reviews and reports on the performance of all entities. The lessons learnt from the Australian Federal Government's experience could be of assistance to the development of regulation review in Indonesia.

The Australian Federal Government has jurisdiction over about 100 law-drafting and regulation-promulgating entities. Regulatory proposals other than laws, such as quasi-regulation and treaties, are included in the RIS process.

The Australian Federal Government directed an independent body, the Productivity Commission (the PC), responsibility for quality control of RISs prepared by Australian Federal Government Departments and agencies. The PC is the Australian Federal Government's principal review and advisory body on microeconomic policy and regulation. The PC is required to report to the Australian Federal Government annually on compliance.

The PC developed and distributed guidelines for best practice for use by departments and agencies. The guidelines adopted OECD endorsed best practice standards and are consistent with the above-mentioned NCC guidelines.

RISs are intended to provide government decision makers with an even-handed description and assessment of all the viable options (including non-regulatory options) for dealing with identified policy issues and their likely impacts.

In 1997, the Government directed that adequate RISs must be made available to the decision makers and, later, be tabled in Parliament with the relevant Bill.

The PC assesses RISs on a case-by-case basis against the following 'general adequacy criteria' that reflect the 'seven steps' of regulatory impact assessment.

***Adequacy criteria for Regulation Impact Statements***

1. Is it clearly stated in the RIS what is the fundamental problem being addressed? Is a case made for why government action is needed?
2. Is there a clear articulation of the objectives, outcomes, goals or targets sought by government action?
3. Is a range of viable options assessed including, as appropriate, non-regulatory options?
4. Are the groups in the community likely to be affected identified, and the impacts on them specified? There must be explicit assessment of the impact on small businesses, where appropriate. Both costs and benefits for each viable option must be set out, making use of quantitative information where possible.
5. What was the form of consultation? Have the views of those consulted been articulated, including substantial disagreements. If no consultation was undertaken, why not?
6. Is there a clear statement as to which is the preferred option and why?

7. Is information provided on how the preferred option would be implemented, and on the review arrangements after it has been in place for some time?

Relevant to all seven criteria is an overriding requirement that the degree of detail and depth of analysis must be commensurate with the magnitude of the problem and with the size of the potential impact of the proposals.

Finally, for proposals which maintain or establish restrictions on competition (such as barriers to entry for new businesses or restrictions on the quality of goods and services available), it must be established that:

- the benefits to the community outweigh the costs; and
- the Government's objective can be achieved only by restricting competition.

The Productivity Commission uses the above criteria as a checklist of each of the seven elements of a RIS.

***Factors in determining compliance***

In assessing RIS adequacy, and therefore compliance by agencies, the Commission applies the principle that the detail and depth of analysis needs to be commensurate with the magnitude of the issue.

The main factors that the Commission takes into account in determining an appropriate level of analysis are:

- the nature and magnitude of the problem;
- the nature and extent of the options for addressing that problem;
- the size and scope of the impacts of those options;
- the extent to which well-informed decision-making can be based on qualitative information alone, or also some degree of quantitative data; and
- the stage of development of the proposal — whether it is broad strategy, options for implementation, or the detailed regulations needed to put into effect an option previously chosen by the Government.

In its 2000-2001 Report, the Commission commented that further improvement in the standard of analysis in RISs, and in use of the process more generally, is necessary before the Government's requirements can be fully met. In particular, the Commission found that some agencies had been treating the RIS requirements as an 'add-on', undertaken too late to make any useful contribution. The Commission recommended that there was a need to embed RIS-type analysis in the policy development processes, especially prior to seeking policy approval from the Government.

***Compliance by Ministries and Agencies***

More than 1900 regulatory proposals were tabled in the Australian Federal Parliament in 2000-2001. 145 of those required the preparation of RISs for decision makers. The Productivity Commission found that requirements were met in 88% of RISs.

The PC publishes details of levels of compliance by each Australian Government department and agency. In its 1999-2000 Annual report the Commission identified the following agencies as having fully complied with RIS requirements at the important decision-making stage as:

Attorney-General's Department
Australian Broadcasting Authority
Australian Communications Authority
Australian Competition and Consumer Commission
Australian Securities and Investments Commission

Civil Aviation Safety Authority
Department of Employment, Workplace Relations and Small Business
Department of Immigration and Multicultural Affairs

Those with better than average compliance rates were:

Treasury and the Australian Taxation Office (tax matters)
Department of Environment and Heritage
Treasury (non-tax matters)

Those with overall compliance rates at about the average were:

Department of Communications, Information Technology and the Arts
National Capital Authority

Below-average compliance rates were obtained from:

Department of Transport and Regional Services
Department of Agriculture, Fisheries and Forestry — Australia
Department of Industry, Science and Resources
Department of Health and Aged Care

The Commission commented that in terms of *significance,* the failure of the Communications and Health departments were the most serious. Such comments amount to a public 'shaming' of the relevant entities and open them and their government ministers to political attack.

## Comments on Best Practice in Regulation

The following comments on best practice in regulation arise from the experience of the Australian Productivity Commission[3].

### *Justification for and net benefits of Regulation*

At the most general level, there are two pre-conditions for good regulation: justification and net benefit:

- It must be established that without regulation the community would be worse off. It must be fully justified — directed at solving a problem that cannot be addressed by the market or by individuals acting without government involvement.
- Overall, the benefits provided by a particular regulation should not just exceed the costs it imposes — the best regulation provides the greatest net benefit to the community out of all the options available. It must provide the greatest net benefit, given its rationale, by being well targeted and minimizing any 'collateral damage' or adverse side-effects.

### *Side-effects and compliance costs*

The best regulation will generally achieve its objectives effectively and directly with minimum adverse side-effects and compliance costs.

The costs of complying with (and administering) regulation increase in line with:

- the detail of the requirements;
- the extent to which they change behavior;
- whether or not they are mandatory or optional;

[3] Annual Reports of the Australian Productivity Commission and speeches by the Commission's Chairman.

- whether or not they are enforced by government or by industry;
- the extent to which they are consistent across jurisdictions and types of business, and (a particular sensitivity!)
- the paperwork involved in demonstrating compliance.

All of these are summed up by the term 'red-tape'. The detail, the technical costs of complying, the extent to which they sidetrack commercial practice all add to a firm's costs.

***Better light than heavy-handed***

Consideration of compliance and administrative costs brings into relief the relative merits of 'light-handed' regulation. As its name suggests, this refers to regulatory approaches, which give greater weight to outcomes than the particular methods of achieving them. At one level is the choice between explicit 'black-letter' regulation, directly imposed and administered by government, and self-regulation, or what has come to be called 'quasi-regulation'.

***Self and quasi -regulation***

Self-regulation may be most appropriate where:

- the problem is a low risk event, of low impact or significance; and
- it can be fixed by the market itself. For example, there may be an incentive for individuals and groups to develop and comply with self-regulatory arrangements because industry survival depends on it.

Quasi-regulation refers to the range of rules, instruments and standards whereby government influences business to comply, but which do not form a part of explicit government regulation. Examples include government endorsed industry codes of practice or standards, government agency guidance notes, industry-government agreements and national accreditation schemes.

Quasi regulation should be considered where:

- there are cost advantages from flexible, tailor made solutions and less formal mechanisms such as access to a speedy, low cost complaints handling and redress mechanisms; and
- there are advantages in government engaging in a collaborative approach with industry, with industry having substantial ownership of the scheme.

For either approach to be successful, there needs to be:

- a cohesive industry with like-minded participants, motivated to achieve the goals;
- a viable industry association with the resources necessary to develop and/or enforce the scheme, and
- effective sanctions or incentives to achieve the required level of compliance.

There are examples of both industry self-regulation and quasi-regulation in Indonesia. The insurance, real estate and direct mail industries have industry self-regulation schemes in operation and the standards authority issues quasi-regulations.

***Encouragement of market forces***

If explicit government regulation is required, it is still preferable to set up structures that maximize the potential for market forces to operate. Competition should apply where possible, with freedom for producers to pursue their commercial interests within reasonable bounds.

***Performance-based rules generally preferable***

Where standards are needed, the understandable temptation for a regulator is to lay down prescriptive, process-based rules to provide certainty. However the informational demands facing the regulator wishing to choose rules about inputs, processes or prices that are optimal — or, more importantly, that will *remain* optimal in ever-changing markets — are extreme.
Seen the other way, 'command and control' approaches can stultify the incentive for firms to search for lowest cost means of achieving regulators' goals. Worse, they can create incentives to find ways of bypassing the rules to the detriment of those goals.
Performance-based rules are generally preferable in those circumstances in which the desired outcome is easily quantifiable. In specifying the desired outcome, they leave it to individuals and firms to seek out the least-cost way of achieving it.

***Good process is the key***

It is all very well to talk about what good regulation looks like; the more difficult task is actually achieving it. The Productivity Commission's (Office of Regulation Review) experience has been that good regulation rarely just 'happens'. Like any other production activity, what comes out at the end depends on the quality of what goes in. Good regulation is generally an outcome of good process.
The essential ingredients of good process involve:

- determining that a problem exists for which regulatory action is justified;
- looking at the impacts and 'administerability' of the alternative means of achieving the objective; and
- deciding among the alternatives, on the basis of transparent criteria.

The identification and evaluation of alternative approaches is at the heart of the process. Doing it well is generally not a simple exercise. It can require information that is not readily available — or is obtainable only from those likely to be affected by the regulation. For this reason, and to achieve wider acceptance of the eventual outcome, public consultation is an important part of the RIS process.

## Some lessons learnt from Australian Experience

***Timing/Quality Trade-Offs***

Australian governments initially agreed the review of the national stock of legislation and implement required reforms would be carried out within four years – ending in the year 2000. That initial target proved to be over-ambitious. By 30 June 1998 only about 30 percent of reviews had been completed – in nearly half the time allocated. Subsequently the governments extended the date to the year 2002. The governments recognized that, given the far-reaching consequences of the review of some of the subject matter, the quality of reform efforts should take precedence over timeliness.

***Skills and Resources***

The lack of availability of adequate skills and resources was a major factor that contributed to the failure to achieve initial targets for review. The availability of these factors had clearly been underestimated.

***Importance of Public Support***

Throughout Australia's economic reform process the importance of public understanding and support has been frequently highlighted. Many reforms have had social impacts that have led to widespread dissatisfaction and public demonstrations. It is therefore important to attempt to forecast possible social consequences of change and encourage consultation and debate involving *all* stakeholders.

***Multiple jurisdictions***

Australia provides an example of difficulties that arise from multiple jurisdictional responsibilities. With nine governments involved in regulating, the multiplicity of interests entails costs that are compounded for those operating in more than one state/territory. Water and electricity supply provide good examples of such areas.

***Multiple jurisdictions – Water supply example***

In 1994, all State and Territory governments agreed that the management and regulation of Australia's water needed significant changes. They agreed on a package of reforms including changes to water prices, allocations, environmental and water quality, and trading. The reforms promote good water management practices and ensure the development of strategies to promote water uses that make good business sense, are good for the environment and ultimately ensure the long-term sustainability of the resource.

Given the importance of this package to the environment and the economy, Australian governments decided in 1995 that implementation of the reforms would be included under the umbrella of National Competition Policy.

In agreeing to the reforms, the governments formally acknowledged, for the first time, that Australian rivers, catchments and aquifers do not stop at State boundaries and that development activity in one State can have impact thousands of kilometers away in other States.

The key areas of water reform are:

- Water pricing based on full cost recovery and the amount of water used.
- The establishment of clearly specified water entitlements and the arrangements to enable trade in those entitlements.
- The allocation of water to the environment.
- The establishment of regulatory and water service institutions that have clear roles and responsibilities.
- Public education and consultation.

Achievements so far include:

- an overall real reduction in residential water bills;
- improved drinking water quality and effluent treatment as a result of reform of water management businesses;
- recognition that water is a scarce resource with prices reflecting the amount of water used to provide an incentive to conserve water;
- recognition of the environment's water needs;
- substantial improvements in natural resource planning; and

- recognition that greater knowledge of the environmental effects of water use is required and, as a result, that water allocations must continue to be conservative.

***Multiple jurisdictions – Electricity supply example***

It is generally accepted that electricity provision has a number of features that indicate a role for government intervention. These include:

- Natural monopoly features – potential for abuse of market power.
- The non-storable nature of electricity.
- Consumption and network externalities – user congestion.
- Community service obligations – consumer price and availability sensitivities.

It is not surprising then that electricity supply is dominated by many rule-makers and regulators. According to the Electricity Supply Association of Australia, electricity supply businesses were surveyed in late 1998 on costs of regulation arising from requirements for provision of information, reporting and compliance. It was estimated that the overall cost to electricity supply businesses and governments across Australia of regulation was at least $100 million.

Pursuant to National Competition Policy, in 1997 a national electricity market was established in Australia. The restructuring of this industry from discrete State-based markets has brought with it a proliferation of regulations and indeed, regulators. Some of this has been devised to manage the transition, but much of it — such as the regulatory framework underpinning the operations of the national market — has a longer-term role.

A particular challenge in achieving best practice regulation in electricity is the mix of jurisdictional involvement. The multiplicity of interfaces entails costs, which impact greatly on entities operating in more than one jurisdiction. At issue is the ongoing need to ensure that the decisions of individual regulators are nationally coherent — meaning that they are mutually consistent and avoid overlap or duplication. These problems are yet to bee resolved.

It is hoped that good process at the level of each individual jurisdiction will add up to good national outcomes. It is expected that competition throughout the national market will ultimately provide its own discipline on regulatory performance within any particular jurisdiction.

While there have obviously been some adjustment costs in the adoption of industry restructuring, the reforms are already providing some real gains. Achievements so far include:

- average electricity prices fell by 24 per cent in real terms from 1991-92 to 1996-97, with most of the direct gains going to business customers, as a result of reductions in cross-subsidies;
- even so, residential electricity prices fell by 7 per cent;
- electricity prices in Australia are now ranked third lowest among a group of 16 OECD countries (marginally above Finland and Canada); and
- labor productivity has doubled, rising from 2 GWh per employee in 1991 to 4 GWh in 1997.

## Possible model for Indonesia

The purpose of regulation review in Australia is to subject to critical analysis, regulations that affect business or restrict competition. Whereas the purpose of regulation review in

Indonesia is to subject to critical analysis, regulations that that will generate economic or social costs for elements of the community. The objectives of the process in both countries are close enough for the Australian experience to be relevant.

Indonesia and Australia have similar tiers of government i.e. National, Provincial (State) and local (Kabupaten/Kota). A simple adaptation of the Australian mechanisms for the review of new regulations and amendments to existing regulations could see the following.

- The Government of Indonesia (GOI) would require Provincial governments to introduce a mandatory methodology for regulation review to be applied in regard to all proposals for new regulations and amendments to existing regulations within their jurisdictions, including local governments. Such a requirement would be accompanied by a fiscal incentive scheme that would effectively reward cooperating entities.

- Each entity within each jurisdiction (including the GOI) would assume responsibility for the preparation of Regulation Impact Statements (RISs) for all new or amended regulations that will generate economic or social costs for elements of the community.

- Each government (including the GOI) would establish a lead agency or 'gate-keeper' that would issue mandatory regulation review procedures and provide technical assistance to all entities within the government's jurisdiction and review and report on their regulation review performance.

- The GOI would establish an independent agency (similar to the Australian National Competition Council) that would distribute guidelines for regulation review, liaise with the regulation review units of all governments and monitor the performance of all governments in order to assess eligibility of governments for incentive payments.

## Appendix 1

# Examples of satisfactory Regulatory Impact Statements

The following examples of RISs considered by the NCC as 'adequate' are summarized from the NCCs 1999-2000 annual Report.

All of these RISs have been tabled in Parliament and are thus public documents and may be accessed at ***www.aph.gov.au/hansard***.

***Electronic Transactions Bill 1999***

- to facilitate the development of e-commerce by removing impediments in the law that may prevent a person using electronic means to satisfy obligations under Commonwealth law.
- the RIS provides a sound case based on a qualitative assessment of costs and benefits.

***Renewable Energy (Electricity) Bill 2000***

- to reduce greenhouse gas emissions through increasing, by the year 2010, the share of Australian electricity generated by renewable means (wind, solar) from 10.5 per cent to 12.5 per cent.
- draws on a wide range of engineering and cost data.

***A New Tax System (Goods and Services Tax) Bill 1998***

- to introduce a goods and services tax to take effect from 1 July 2000
- this RIS provided a broad overview of what groups would be affected and to what extent.

***Migration Legislation Amendment (Migration Agents) Bill 1999***

- to extend for three years a scheme of statutory self-regulation of those providing advisory services to migrants.
- an example of government regulatory backing for what is essentially an industry self-regulation scheme.

***Fisheries Legislation Amendment Bill (No. 1) 1999 – (Complete Regulation Review Statement is at Appendix 2)***

- to regulate fishing on the 'high seas', outside Australia's 200 nautical mile zone.
- an example of a RIS on the implementation, via Australian law, of an international treaty signed by Australia.

***Trade Practices (International Liner Cargo Shipping) Amendment Bill 2000***

- to modify arrangements whereby liner shipping conferences are exempted from certain provisions (misuse of market power) of the Trade Practices Act.
- an example of a RIS covering proposals consequent on a wide-ranging public inquiry process and published report.

***Postal Services Legislation Amendment Bill 2000***

- to implement an access regime whereby private sector mail services would be able to utilize parts of the Australia Post distribution network.
- this RIS provides a good example of assessing various options taking into account the promotion of further competition, allowing commercial negotiations to settle issues as much as possible, and keeping compliance costs to reasonable levels.

***New Business Tax System (Alienation of Personal Services Income) Bill 2000***

- to address a growing threat to the income tax base whereby income from personal services is being directed to an interposed entity rather than to the person providing the services, thereby avoiding rates of income tax that should apply to individuals.

- this RIS is an example covering the implementation of recommendations made by a review of business taxation, which addressed all the essential features of a RIS — problem, objective, and options. It should be noted that RISs on tax matters are subject to lesser requirements than RISs in general

***Fuel Quality Standards Bill 2000***

- to regulate the quality of fuel in order to reduce air pollution and to facilitate the adoption of improved engine and emission control technologies.
- this RIS is a good example of a combination of quite complex technological, environmental and health issues with substantial investment cost implications for the refining industry. Reflecting that, the RIS is some 40 pages long. It sets out in detail seven different options. It provides estimates of the costs and benefits of the preferred option, including valuations of the avoided health care costs resulting from reductions in air pollution.

***Accreditation Grant Principles 1999***

- this was a disallowable instrument tabled in Parliament in September 1999. It set down the legal framework for the accreditation of aged care facilities, entailing a move from passive monitoring of standards to an active audited regime of continuous improvement.
- this RIS demonstrates how the consultation process can provide valuable information, which helps in the design of better regulation.

## Appendix 2

# Fisheries Legislation Amendment Bill (No. 1) 1999

# REGULATION IMPACT STATEMENT

**Introduction**

The Regulation Impact Statement only deals with the proposal to ratify the Fish Stocks Agreement.

**1. The Problem**

The UN Fish Stocks Agreement (the Agreement) was negotiated to ensure the long-term conservation and sustainable use of straddling fish stocks[1] and highly migratory species[2] through cooperative regulation of high seas fishing.

Under the United Nations Convention on the Law of the Sea (UNCLOS) coastal nations may claim an Exclusive Economic Zone (EEZ) up to 200nm from the baseline. Within this zone, nations have the sovereign right to explore and utilise the natural resources, both living and non-living, and an obligation to conserve and manage these resources. The high sea is the area beyond the EEZ. The high seas comprise around 60% of the worlds oceans. By the 1990s, the proportion of the worlds fish catch that was taken from the high seas had doubled to 11% from 1980 levels; a level considered by the United Nations Food and Agriculture Organisation (FAO) to be unsustainable. Unsustainable fishing activity exists on the high seas because it is an area where all countries have the freedom to fish and is beyond the control of any one country.

High seas fisheries are characterised by

- Lack of regulation
- Overcapitalisation
- Excessive fleet size
- Lack of cooperation between countries
- Vessel re-flagging to escape controls
- Insufficiently selective gear
- Unreliable databases

The problems associated with unregulated high seas fishing were discussed during the 1992 United Nations Conference on Environment and Development, which led to the adoption of Agenda 21 of the Rio Declaration. Agenda 21 recognises there has been ineffective international conservation, management and sustainable use of straddling stocks and highly migratory stocks.

It is generally agreed amongst fisheries managers and the international community that regulation and cooperation is necessary to manage and conserve the living resources of the high seas and the associated resources within EEZs. Recognising this, several countries initiated action through the United Nations and the UN Fish Stocks Agreement was negotiated. Because of our national interest in solving problems associated with unregulated high seas fishing through better management, Australia signed the UN Fish Stocks Agreement when it was finalised in 1995.

Fishing on the high seas may also impact on non-fish migratory species of conservation concern such as cetaceans, seabirds and turtles. Regulation of fishing on the high seas may minimise these impacts.

1.1 Impact on Australia

The Australian EEZ is over 11 million square kilometres, and is largely comparable with the AFZ. Despite the size of our fishing zone, total fisheries production is relatively low as Australia's marine environment, whilst diverse, is low in nutrients and biological productivity. Australian fisheries production, however, is based on high value species such as prawns, lobsters, abalone and tuna. These species sustain lucrative industries that provide regional employment and significant export income.

High seas fisheries are often based on highly migratory species and straddling stocks, which are mainly managed on behalf of the Commonwealth by the Australian Fisheries Management Authority (AFMA). In the Australian context, straddling stocks are those that straddle the boundary of the (AFZ) and adjacent high seas. Orange roughy on the South Tasman Rise is an example of an Australian straddling stock. Patagonian toothfish in the area of the sub Antarctic external territories is also potentially a straddle stock. Highly migratory species are those that migrate through the AFZ, such as Southern Bluefin Tuna and other tunas and billfish. In the high seas discrete high seas fish stocks also exist which may neither be a straddling or highly migratory stock.

Though some principles and obligations of the Fish Stocks Agreement may apply to these discrete stocks they are not the focus of management arrangements.

The problems associated with high seas fisheries impact on Australia and its domestic fishing industry in a number of ways. Overfishing of highly migratory and straddling stocks on the high seas not only threatens the sustainability of those high seas fisheries but also that of domestic fisheries for those stocks within the AFZ. Regulation of the fishing for those stocks on the high seas is necessary to ensure the integrity of sustainable management measures imposed on domestic fisheries for straddling and highly migratory stocks within the AFZ. The pressures on these resources are unlikely to be alleviated without regional cooperation and implementation of the Fish Stocks Agreement framework to ensure sustainable development. Australian must participate in international fora and take diplomatic action to promote cooperative management and protect our national fishing interests.

Due to the vast size of our fishing zone, illegal, unregulated and unreported (IUU) fishing has been a problem, particularly in some of our remote external territories. Illegal fishing differs from unregulated fishing on the high seas, where all countries have the freedom to fish.

Illegal fishing occurs where foreign vessels fish for stocks within the AFZ without authorisation from the relevant Australian authorities. This illegal fishing impacts on the sustainability of certain highly migratory and straddling stocks, in particular, the Patagonian toothfish. Regional conservation cooperative efforts in Commission for the Conservation of Southern Bluefin Tuna (CCSBT) and the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) are undermined by IUU fishing

1.2 Illegal, unregulated and unreported fishing

Unregulated fishing has been a recent issue on the South Tasman Rise, threatening the sustainability of the orange roughy stocks in the region. The vessels which where undermining the regionally agreed conservation measures were boats flagged by Countries which are expected to becomes parties to the Fish Stocks Agreement. If the Agreement were in force at the time of the incident occurring, Australia would have been able to board, inspect, and potentially have taken enforcement action against the vessels.

Heard and McDonald Islands (HIMI) is the Australian external Territory located approximately 4000 kilometres southwest of Perth. Waters surrounding the islands out to 200 nautical miles are part of the AFZ and adjoin the French EEZ associated with Kerguelen Island. The Islands are home to a fishery for Patagonian toothfish. The Patagonian toothfish is susceptible to overexploitation as they take over 10 years to reach sexual maturity and are relatively slow growing. AFMA has licensed only two vessels to fish the area. The fish is a high value species and the licensed vessels operate under strict environment controls to ensure the long-term sustainability of the fishery and the natural and heritage values of Heard Island.

The illegal catch is directly jeopardising the sustainability of the fishery, and export dollars for the Australian industry. The catch taken by those Australian operators and other authorised operators in the CCAMLR area, is only a fraction of the toothfish traded in recent years. There has been substantial illegal fishing in the waters associated with Australian, French and South African territories and unregulated fishing in the broader CCAMLR area.

***The value to Australia of highly migratory and straddling stocks that the UN Fish Stocks Agreement will assist in sustaining amounts to over $250 million per annum. The estimated value these stocks, based on projected 1999 national catches, is detailed in Table 1. This does not include the potential value to Australia of increased involvement in high seas fishing. It is expected that Australia still has much to gain.***

***Table 1: Estimated value of highly migratory and straddling stocks based on projected 1999 national catches***

| Fishery | value | tonnes |
|---|---|---|
| Southern Bluefin Tuna fishery | $190 m | 5265 |
| South Tasman Rise Orange Roughy fishery | $7.5 m | 1800 |
| East Coast Tuna and Billfish (yellowfin, big eye and albacore tunas, billfish and swordfish) | $37.5m | 5400 |
| West Coast Tuna and Billfish Fishery (yellowfin, bigeye, billfish and swordfish) | $7.2m | 2220 |

| | | |
|---|---|---|
| Heard Island Patagonian toothfish | $25 m | 3590 |
| TOTAL | $267m | 18275 |

*Source: BRS, ABARE, AFMA*

1.3 Implications of a do-nothing approach

As a signatory to the UN Fish Stocks Agreement, Australia is obliged to refrain from acts that would defeat the object and purpose of the Agreement (*Vienna Convention on the Law of Treaties* (ATS 1974, 2, Article18). Ratification of the Agreement will enable Australia to pursue the opportunities from its rights under the Agreement. Additionally, if legislation were not passed to enable Australia to implement its obligations under the UN Fish Stocks Agreement, Australian vessels currently fishing on the high seas would have to cease their operations until we are able to exercise flag State control. Australian vessels could also be excluded from participating in high seas fisheries subject to regional fisheries management arrangements where Australia was not a member or participating and cooperating with regional measures.

Ratifying the Agreement will maintain the international momentum in bringing the Agreement into force. Twenty three countries have ratified the Agreement, and other like-minded countries are close to finalising legislation to ratify. The Agreement will come into force once thirty countries have ratified. Widespread adoption of the Agreement is necessary in order that it will eventually become customary law and provide means of addressing the problems of unregulated and unreported fishing on the high seas.

A do-nothing approach would have a negative impact on Australias reputation as a world leader in sustainable fisheries management and on Australias role in environmental matters generally. Australia played an active role in negotiating the UN Fish Stocks Agreement and takes a strong stance in other fora in support of the objectives of the Agreement.

Australia currently participates in a number of regional fisheries management organisations. When the Agreement comes into force, the ability of Regional Fisheries Management Organisations (RFMOs) such as CCSBT and CCAMLR to effectively manage fisheries will be strengthened. Additionally, our ability to deal effectively with unregulated fishing for example on the South Tasman Rise, and with non-parties to relevant RFMOs, will be increased.

We need to participate in new RFMOs, as members agree on such rights as participatory rights, allocations of allowable catch, or levels of fishing effort. It is in the national interest to be part of the decision making processes, as the rights of members who join later will then depend on the existing level of effort and the status of the highly migratory and straddling stocks managed by the RFMO.

If Australia does not become involved early in the process, we will have lost the opportunity to secure a share of high seas resources, and the sustainability of those stocks within the AFZ. As many of the fisheries in the AFZ are fully utilised it is increasingly important to secure opportunities to extend efforts to the high seas. To ensure sustainability of straddling and highly migratory fish stocks within the AFZ it is important to control unregulated fishing for these stocks on the high sea.

1.4 Why is government action needed to correct the problem?

Government action is needed to address the problem of unregulated fishing on the high seas because:

a. the problem is one of market failure

   The resources of the high seas including fish stocks are common resources. There are no property rights and few, if any, restrictions on their use. The United Nations Convention on the Law of the Sea (UNCLOS) provides for freedom of the high seas, qualified by an uncertain requirement to cooperate, that is, they are open to all countries so there is limited incentive to conserve the resource or regulate their catch when the actions of others would undermine these efforts. Consequently unregulated and unreported fishing makes sustainable management of high seas stocks extremely difficult. While UNCLOS Articles 116-119 covers all living resources of the high seas, the Fish Stocks Agreement only implements and clarifies the requirements to cooperate in the management of straddling stocks and highly migratory species. Government regulation and coastal State cooperation is necessary to ensure their use is sustainable.

b. the problem requires international cooperation

   In order to manage the common resources of the high seas sustainability, international cooperation is necessary. The UN Fish Stocks Agreement provides for the establishment of Regional Fisheries

Management Organisations (RFMOs) or similar arrangements to devise and implement conservation and management measures for highly migratory and straddling stocks. It is clearly the role of Government to participate in the international negotiations that take place in these organisations, after appropriate consultation with stakeholders. Issues such as sovereign rights over resources of the EEZ and associated national revenue security may be impacted on through these negotiations.

c. the magnitude of the problem and solutions require government intervention

As a party to UNCLOS convention, Australia has benefited through the articles of UNCLOS that provide for countries to claim 200nm exclusive economic zones. Within the EEZ, countries have exclusive rights to conserve and manage the living and non-living resources. Government intervention is needed for international negotiations and issues of national sovereignty and security related to management of our vast EEZ, particularly to combat IUU fishing. Marine surveillance and enforcement is costly and specialised and requires Government action to ensure this is carried out. Cooperation on compliance matters between parties to the Agreement will enable Government enforcement dollars to be more effective that when applied unilaterally.

## 2. Objectives

2.1 What are the objectives of government action?

The primary objective of Government action is to ensure the long-term conservation and sustainable use of Australian straddling fish stocks and highly migratory fish stocks throughout their range. The sub-objectives include:

- control overfishing and excess capacity that currently exists due to the current lack of regulation and freedom of access to the resources of the high seas.
- implementing sustainable management principles for Australian vessels fishing for stocks both within and outside the AFZ
- increased cooperation between countries to effectively regulate fishing on high seas
- reduce potential for conflict between countries over these resources
- increase cooperative enforcement to reduce illegal fishing for highly migratory and straddling stocks
- ensure a level playing field raising the global level of fisheries management to that implemented domestically in the AFZ
- ensure protection of national interest and sovereign rights over living resources in the AFZ
- to ensure our obligations under UNCLOS are met in relation to cooperating to conserve and manage high seas straddling and highly migratory stocks

2.2 Is there a regulation/ policy currently in place? Who administers it?

There are a number of regulations and policies currently in place which have a bearing on the management of highly migratory and straddling stocks including the UN Fish Stocks Agreement itself. Outlined below is the key legislation and international arrangements that are associated with regulation of high seas fishing and utilisation of straddling and highly migratory fish stocks[3].

a. The United Nations Convention on the Law of the Sea 1982.

The United Nations Convention of the Law of the Sea 1982 (UNCLOS) establishes a comprehensive framework for the regulation of all ocean space. It contains provisions on, *inter alia*, the limits of national jurisdiction over ocean space, access to the seas, navigation, protection and preservation of the marine environment, exploitation of living resources and conservation, scientific research and settlement of disputes. The Convention was opened for signature on 10 December 1982 after more than 14 years of work by over 150 countries. It entered into force for Australia and generally on 16 November 1994 and is a legally binding regime.

The key features of the Convention as they related to the management of straddling and highly migratory species include:

Coastal states have sovereign rights in a 200 nautical mile exclusive economic zone (EEZ) with respect to natural resources.

Articles 116-119 allow all States the freedom to fish on the high seas although they are obliged to adopt, or cooperate with other States in adopting, measures to manage and conserve the living resources of the high seas.

Articles 63 & 64 provide specifically for the management of stocks that occur within and outside one EEZ. The Articles being: 63(1) where the stock is shared between two or more EEZ; 63(2) straddling stocks; and 64 highly migratory species.

**Article 63 (2)**

This article requires that where the same stock or stocks of associated species occur both within the

EEZ and in an area beyond and adjacent to the zone, the coastal State and the State fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organisations, to agree upon measures necessary for the conservation of these stocks in the adjacent area[4]

**Article 64(1)**

This article requires that the coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex 1 of UNCLOS (see at Attachment A), shall cooperate directly or through appropriate international organisations with a view to ensuring conservation and promoting the objective of optimum utilisation of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organisation exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organisation and participate in its work.

The Convention is implemented by various Commonwealth agencies including AFMA, Environment Australia, AFFA, and the Australian Maritime Safety Authority.

b. Fisheries Management Act 1991

The *Fisheries Management Act 1991* (FMA) provides the legislative basis for fisheries management by AFMA. The FMA provides for management of the Australian Fishing Zone (AFZ) which is defined to include the waters between three miles and two hundred nautical miles off the territorial sea baseline around Australia and the external Territories. The objectives include, *inter alia*:

- implementing efficient and cost effective fisheries management on behalf of the Commonwealth;
- ensuring that the exploitation of fisheries resources and the carrying on of any related activities are conducted in a manner consistent with the principles of ecologically sustainable development and the exercise of the precautionary principle, in particular the need to have regard to the impact of fishing activities on non-target species and the long term sustainability of the marine environment.

When implementing the objectives, AFMA is to have regard to the objectives of :

- ensuring, through proper conservation and management measures, that the living resources of the AFZ are not endangered by over-exploitation; and
- achieving the optimum utilisation of the living resources of the AFZ.

ff. Fisheries Administration Act 1991

The *Fisheries Administration Act 1991* (FAA) establishes AFMA and provides its objectives and functions. The Act also provides for the administration of the Authority including appointment of Directors, Chairperson and the establishment and administration arrangements for various committees.

ff. Australias Oceans Policy

Australias Oceans Policy was launched in December 1998 after Cabinet endorsement. The Policy establishes a framework for greater integration between ocean users and an ecosystem approach to planning and management. Australias rights and obligations under UNCLOS were fundamental to the development of the Oceans Policy. Protecting Australias national interest is a key goal of the policy, which states the Governments commitment to ratifying and implementing the UN Fish Stocks Agreement.

ff. National Fisheries Bycatch Policy

Focus on the take of non-target species in fishing - known as bycatch - has grown in importance over the past few years. The National Fisheries Bycatch Policy is an expression of intent by all fisheries ministers and the fishing industry about bycatch and provides a national framework for coordinating efforts for bycatch including development of more selective fishing gear and reduction of wastage through identification of markets. The Policy provides options by which each jurisdiction can manage bycatch according to its situation in a nationally coherent and consistent manner.

The Commonwealth is finalising a bycatch policy - the original model for the National Bycatch Policy - that should be released later in the year. Under the Commonwealths policy, all Commonwealth fisheries will be required to prepare Bycatch Action Plans. Plans will be prepared for Commonwealth fisheries on a priority basis under the Commonwealth Bycatch Policy. The lead agency responsible for implementing the policy is AFMA.

ff. Environment Protection and Biodiversity Conservation Act 1999

The Environment Protection and Biodiversity Conservation Act 1999 (EPBCA), administered by Environment Australia, will come into force in the year 2000. Its objectives include to:

- provide for protection of the environment, particularly matters of national environmental significance;

- promote ecologically sustainable development of natural resources, and conservation of biodiversity; and
- assist in the cooperative implementation of Australias international environmental responsibilities.

The Act will apply to the management of highly migratory and straddling stocks through strategic environment assessment of fisheries management plans dealing with these species.

The provisions of the Act are consistent with some of the general principles of the UN Fish Stocks Agreement including assessing the impacts of fishing and protecting biodiversity in the marine environment.

a. Convention for the Conservation of Southern Bluefin Tuna (CCSBT)

   The CCSBT was established to conserve and manage the global SBT stock. Australia, Japan and New Zealand are the only countries who have ratified the Convention although Indonesia, Taiwan and Korea are also significant SBT fishing countries. The Convention formalises the previous voluntary management arrangements observed by the three parties since the 1980s.
   The Convention established the Commission for the Conservation of Southern Bluefin Tuna, which should determine an annual total allowable catch based on advice from its Scientific Committee, and allocate that catch between member nations. AFFA, AFMA and CSIRO are the key Australian agencies involved in the deliberations of the Commission.
   Ratifying the UN Fish Stocks Agreement will strengthen the CCSBT and increase transparency through exchange of data and cooperative enforcement. Ratifying the Agreement will also create an incentive for current non-parties to join the CCSBT by the requirement to participate in the relevant RFMO or require their vessels and nationals to refrain from fishing for SBT.

b. Indian Ocean Tuna Commission (IOTC)

   The Indian Ocean Tuna Commission Agreement came into force on 27 March 1996 and established the IOTC as a regional fisheries body within the framework of the FAO. The membership includes Australia and other nations associated with the Indian Ocean region. The objective of the IOTC is to promote cooperation among members and to ensure through appropriate management the conservation, optimum use and sustainable development of stocks of tuna and billfish of the region. Australias interests in respect of the IOTC focus on the conservation and management of the southern bluefin tuna stock and the tuna and tuna-like species found in the waters of the western and southern Australian EEZ. AFFA, AFMA and CSIRO are the key Australian agencies involved in the deliberations of the Commission.

c. Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR)

   The Convention was drafted following recognition by the Antarctic Treaty Consultative Parties of the importance of safeguarding the marine living resources, environment and ecosystem of the seas surrounding Antarctica. Australia is a party to the Convention, which came into force generally on 7 April 1982. The objective of the Convention is the conservation of Antarctic marine living resources. This also includes rational use in line with the principles of ecosystem maintenance, stable recruitment and minimising impacts on the marine ecosystem.
   Major problems with IUU fishing in the CCAMLR region could be dealt with more effectively if nations were parties to the UN Fish Stocks Agreement. CCAMLR has urged its members to sign and ratify the Agreement as soon as possible. Environment Australia, AFFA and AFMA are the key agencies involved in CCAMLR.

d. South Pacific Forum Fisheries Convention

   The South Pacific Forum (including Australia and New Zealand) agreed in 1979 to cooperate on fisheries matters through the establishment of a regional fisheries organisation, reflecting the strong view of Pacific island countries that they had sovereign rights to the living marine resources of the adjacent waters. The Forum adopted the Forum Fisheries Agencies Convention in July 1979, which came into force the following month. The FFA largely functions on donor contributions for various programs, which provide expert natural resource management and economic advice in the region to the Island States. The convention is designed to promote regional cooperation and coordination of fisheries policies, secure maximum benefits from the marine living resources and facilitate collection and exchange of data and management information.
   The FFA first convened the Multilateral High Level conference in 1994. This conference is developing a convention for the tuna resources of the Western and Central Pacific. Australias East Coast Tuna and Billfish Fishery depends on sustainable management of these resources. The present draft of the proposed convention draws heavily on the text of the Fish Stocks Agreement and contains a similar

objective of ensuring the long-term conservation and sustainable management of highly migratory fish stocks in the western and central Pacific Ocean.

e. The UN Fish Stocks Agreement

The UN Fish Stocks Agreement will implement provisions of the UNCLOS relating to straddling and highly migratory fish stocks, that is, articles 63 & 64. The UN Fish Stocks Agreement builds on articles 63 & 64 by providing general management principles to apply to the management of straddling and highly migratory stocks. The Agreement provides mechanisms for international cooperation for the management of straddling and highly migratory species in particular, the establishment of subregional and regional fisheries management organisations. Parties to the UN Fish Stocks Agreement are required to participate in the relevant RFMO where they have an interest in the fishery or to otherwise refrain from participating in that fishery.

As a signatory to the UN Fish Stocks Agreement, Australia is obliged to refrain from acts that would defeat its objectives and purpose. It is the role of the Department of Agriculture, Fisheries and Forestry and the Australian Fisheries Management Authority to oversee the Agreement.

The UN Fish Stocks Agreement is consistent with Australian fisheries management and environment policies within the AFZ. Many of the contemporary management principles provided in the UN Fish Stocks Agreement are contained in the FMA, although the Agreement provides guidance on practical implementation.

It is consistent with Australia's existing policy to seek membership of relevant RFMOs. The proposals will strengthen the current RFMOs in which Australia participates including providing for compulsory and binding settlement of disputes, increased transparency by data exchange and cooperative enforcement measures.

## 3. Options

### A: Self or quasi regulation

The approaches of self-regulation or quasi regulation are not considered to be feasible options for implementing the obligations of the UN Fish Stocks Agreement for the reasons outlined below. Government regulation is considered to be the only feasible option for implementing the UN Fish Stocks Agreement.

- The fish stocks involved are a common resource which requires regulation to prevent overfishing

  Unregulated fishing for straddling and highly migratory fish stocks on the high seas has direct impacts on the sustainability of the stocks that also occur within the Australian Fishing Zone. The Australian Fishing industry depends on these stocks which account for almost 30% of the value of Commonwealth fisheries production. Tuna accounts for over 30% of the value of the fish component of Australias aquaculture production. As fisheries for these stocks within the AFZ become fully utilised, there will be an expansion of the Australian industry involvement on the high seas.

- The high impact on other species of unregulated fishing

  Unregulated fishing also impacts on associated or dependant species posing threats to species and biodiversity. Unregulated longlining for highly migratory and straddling stocks, threatens endangered species such as Albatross. Four species of albatross are listed as endangered and thirteen as vulnerable under the *Endangered Species Protection Act 1992*.

- There is strong public interest and concern about unsustainable IUU fishing

  Conservation groups, fishing industry and the general community has expressed a strong interest in the issues of unsustainable high seas fishing and illegal, unregulated and unreported fishing, particularly as it affects Australias living resources.
  The World Wide Fund for Nature (WWF) ran an Endangered Seas campaign in 1996 and received over 1000 responses from members in support of immediate ratification of the UN Fish Stocks Agreement. More recently the Prime Minister has received numerous letters through a Greenpeace campaign from interested members of the community, expressing concern about the issues of IUU fishing particularly in the southern ocean and urging the Government to ratify the UN Fish Stocks Agreement as a matter of urgency.
  Industry is concerned about the impacts of IUU fishing on the sustainability of the stocks on which they depend, particularly when the Australian industry operates under strict environmental controls.

- Specific provisions of the Agreement require Government action

  Many of the legal rights and obligations of the Agreement are the clear role of Government, in particular enforcement. As a party to the UN Fish Stocks Agreement, Australia would be required to implement duties as a flag state including regulating the activities of its vessels on the high seas and in

areas under the national jurisdiction of other States, including enforcement and criminal proceedings. The Agreement also requires Australia to cooperate with other parties for surveillance and enforcement including boarding, inspecting and potentially apprehension of foreign flagged vessels on the high seas

- Some provisions of the UN Fish Stocks Agreement would be difficult for industry to enforce

  Australia has a right under UNCLOS to protect its sovereign rights to the resources of its EEZ. The Australian EEZ is vast, making surveillance and enforcement operations costly. Enforcement, particularly with foreign fishing, requires specialised training and technology only available to Government.

- Fisheries are managed under specific legislation

  AFMA was established under the *Fisheries Administration Act 1991* and the legislative basis for its management activities is provided in the *Fisheries Management Act 1991.* Australias obligations under the UN Fish Stocks Agreement are the responsibility of Government and largely fall under the management of AFMA. It would not be possible to pass these responsibilities to industry. Amending the legislative function and objectives of AFMA will be necessary to implement the Agreement.

**B. Government regulation**

Government regulation is considered to be the only feasible option for the following reasons:

- The fish stocks involved are a common resource which requires regulation to prevent overfishing
- The high impact on other species of unregulated fishing
- There is strong public interest and concern about the problem
- Specific obligations, particularly surveillance and enforcement, require Government action
- A regulatory approach is consistent with the current fisheries management regime

Three regulatory options (B2,B3 and B4) are being considered as well as a do nothing approach (B1). The options are

**B1** do nothing: no regulation, do not ratify
**B2** Minimum regulation required in order to ratify and effectively meet obligations
**B3** Minimum regulation required in order to ratify, do not participate in RFMOs
**B4** Greater regulation associated with ratification

The UN Fish Stocks Agreement is an international legally binding treaty on Australia and other nations and has some minimum requirements (and prescriptive provisions) that are best implemented through amendments to current fisheries management legislation. Many of the obligations of the UN Fish Stocks Agreement may be implemented administratively or under existing provisions of the FMA and FAA. The regulatory options under consideration for **B2 & B3** include:

- amending the statutory functions and objectives of the Australian Fisheries Management Authority to reflect the international obligations of the UN Fish Stocks Agreement
- specific amendments, for example to create new offences or extend the geographical operation of existing provisions
- amending the statutory powers of AFMA officers to enable them to exercise enforcement powers on the high seas

The **B4** option would involve additional amendments including creating offences for Australian nationals on the high seas, a new regime for creating and administering fisheries masters licenses, and more prescriptive general management principles.

A summary of the costs and benefits of each option is at **Table 2**.

## 4. Impact analysis

4.1 Who is affected by the problem and who is likely to be affected by its proposed solutions?

Groups affected by the problem of, and solutions to, unregulated fishing of highly migratory and straddling stocks on the high seas include:

1. The Australian Fisheries Management Authority
2. The Department of Agriculture, Fisheries and Forestry Australia
3. The Department of Environment and Heritage (including Environment Australia and the Australian Antarctic Division)

4. Environment groups/community
5. The Commonwealth fisheries[5] likely to be affected are those based on highly migratory and straddling stocks including the:

Eastern Tuna and Billfish fishery

South Tasman Rise and wider Tasman Seas High Seas fishery

Southern Bluefin tuna fishery

Sub-Antarctic fishing within the CCAMLR region including Heard and McDonald Islands fishery

Western Tuna and Billfish fishery

High Seas exploratory fisheries

4.1 How will each proposed option affect existing regulation and the roles of existing regulatory authorities.

The proposed options for amendments to Government legislation will have some impact on the scope of existing legislation and existing regulatory authorities, with a net result of extending and strengthening the existing regulations and policies to better manage highly migratory and straddling stocks.

The proposed options involve amending existing Commonwealth fisheries management legislation: The Fisheries Management Act 1991 and Fisheries Administration Act 1991, which are administered by AFMA. Implementing the UN Fish Stocks obligations will mean the role of AFMA will be extended to the high seas with a corresponding increase in operating costs. This will enable AFMA to more effectively manage straddling and highly migratory stocks through their range and have a higher level of confidence in managing these stocks within the AFZ.

The **B2** option has no immediate additional resource or policy implications for the Defence portfolio. It is noted that Defence has already participated in a constabulary role in apprehending foreign illegal fishers impacting on Australian natural resources. There may be longer-term implications that may flow from future discussions on implementation affecting the nature and areas where Defence support may be required for protecting sovereign rights. Defence will be involved in ongoing inter-departmental discussions on the issue. Option **B4** would have implications possibly for agencies such as the Department of Immigration and Multicultural Affairs in cases requiring extradition.

The UN Fish Stocks obligations are consistent with UNCLOS, which Australia has ratified. They are also consistent with Australia's approach in RFMOs and regional arrangements. For example, CCAMLR measures already implemented by Australia include mandatory use of a vessel monitoring system (VMS) and, development of a vessel register and uniform vessel and gear marking which is a minimum standard for flag state responsibility under the UN Fish Stocks Agreement. The Agreement has already become a reference document for the adoption of standards and guidelines; and for the harmonisation of management measures within regional fisheries organisations.

**TABLE 2: summary of the expected impacts of the proposed options as likely benefits or likely costs**

| OPTION | COSTS | BENEFITS |
|---|---|---|
| **B1**<br>**Do nothing:**<br>**No regulation**<br>**do not ratify** | Unable to authorise and monitor Australian vessels on the high seas<br>Share of in zone (EEZ) resources worth approximately $250 million per annum threatened<br>No extension of Australian conservation measures and research (eg threat abatement plan for the incidental catch of seabirds )<br>No support for combating illegal fishing in remote AFZ areas no cooperation in compliance of remote AZ areas and high seas<br>Limited exchange of fisheries data<br>Loss of international credibility as leader in sustainable fisheries management | Low administrative cost and burden |

| | | |
|---|---|---|
| **B2**<br><br>**Regulation as outlined, ie Ratify Agreement and participate in RFMOs**<br><br>**(Refer to tables 1-3 for a quantitative assessment of the costs of this option)** | Resources required:<br>• Establish and administer a high sea fishing concession system and record of Australian boats fishing on the high seas<br>• Fisheries officers for high seas management, enforcement and participation in RFMOs<br>• Membership fees for RFMOs<br>Possible cost to industry for high seas licence (if not already participating in relevant fishery) and marginal cost increases to meet obligations including carrying a satellite based vessel monitoring system (VMS) and completing catch and effort logbooks.<br>Refer to tables 2.1-2.3 for a summary of estimated costs | Able to authorise Australian vessels to fish on the high seas<br>Assist in sustaining highly migratory stocks both on high seas and within AFZ through compatible management regimes<br>Access to international fisheries data for management<br>Ability to combat illegal, unregulated and unreported fishing through increased surveillance and enforcement powers<br>Strengthen existing RFMOs including CCSBT<br>Security for current domestic industry for straddling and highly migratory stocks worth over $250 million per annum |

| **OPTION** | **COSTS** | **BENEFITS** |
|---|---|---|
| **B3**<br>**Regulation as outlined in B2**<br>**Ratify the Agreement but do not participate in regional organisations**<br>**Limited flag state monitoring and control**<br>**Limited authorised fishing** | No protection of national interest in RFMOs<br>Share of resources threatened<br>Impact on in zone (EEZ) fisheries<br>No extension of Australian conservation measures and research (eg threat abatement plan for longline catch of Albatross) through RFMOs<br>No support for combating illegal fishing in remote AFZ areas no cooperation in compliance<br>Limited exchange of fisheries data | Lower cost and administrative burden compared with option B2 due to the avoidance of costs associated with participation in RFMOs. These costs are outlined in Table 2.2. |
| **B4**<br>**Greater Regulation**<br>**Offences for nationals**<br>**Administration of masters licences (need new regime)**<br>**Monitoring nationals on foreign boats**<br>**More prescriptive general principles** | Costs as outlined for option B2 plus:<br><br>Increased administrative costs and burden for Government in establishing new master licence regime<br>Increased cost and paper burden for industry<br>Increased fees<br>Difficult and costly to monitor<br>Increased impact on the role of other agencies<br>Duplication of effort and provisions in other existing legislation | Greater control over nationals on foreign fishing boats |

The following Tables detail the estimated costs for option **B2**. The activities listed in the first table would be the minimum required if Australia ratifies the Agreement and authorises Australian fishing on the high seas. The second table details the cost of participation in RFMOs and the third table details some additional costs for activities that would not necessarily need to be undertaken to meet obligations.

**Table 2.1/ Option B2 - Estimated Operating and Compliance Costs - AFMA**

| **Activity** | **Cost (based on 40 boats see Assumptions** | **Government contribution** | **Industry contribution** | **Description** |
|---|---|---|---|---|
| Authorisation of operations/ licensing | $34,560 one-off cost<br><br>$24,750 p.a | | 100%<br><br>100% | Establishment of fishing concessions unit register and development of conditions<br>Ongoing fishing concessions register maintenance |
| Compliance Monitoring | $32,400 p.a. | 50% | 50% | VMS reporting at the rate of 6 reports per day. Includes an allowance for immediate polls and text communication costs |
| Log book data and entry | $11,000 p.a. | | 100% | Based on current average per vessel cost for all tuna vessels (ECT and SBT) monitored by AFMA, and also includes printing of additional logbooks. |
| Compliance Planning in RFMOs<br>• Travel<br>• Other Admin | $135,000<br><br>$23,600<br>$11,800 pa | 100%<br>100%<br>100% | | Responsible for :<br>• RFMO compliance program planing<br>• Project management and strategic liaison<br>• Coordinating compliance activities<br>• |
| **Total** | **$273,110** | **$186,600** | **$86,510** | |

**Table 2.2/ Option B2 - Participation in RFMOs AFFA and AFMA**

| Activity | Cost | Government contribution | Industry contribution | Description |
|---|---|---|---|---|
| Membership fees required for existing RFMOs | $105,000 pa | 100% | | Membership fees for the IOTC. (Membership fees for CCMLAR are covered by DFAT and CCSBT by AFFA.) |
| Estimated membership fees for proposed new RFMOs | $350,000 pa | 100% | | For proposed Tasman Sea Regional arrangements and Central and Western Pacific Commission |
| Policy development in RFMOs AFFA | $800,000 pa | 100% | | 4 ASL to participate in existing and proposed RFMOs. Includes travel and overheads. |
| Policy development in RFMOs - AFMA | $1,070,152 pa | 100% | | Includes 7 ASL to participate in new and existing RFMOs. Includes travel and overheads. |
| Technical support(scientific and legal) | $750,000 pa | 100 % | | Scientific and legal advice for participation in RFMOs eg devising conservation and management measures. |
| **TOTAL** | **$3,075,152** | **$3,075,152** | **NIL** | |

**Table 2.3/ B2 - Special Tasking Variable**